WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

October 4, 2013

sent electronically

Brenden McFarland
Department of Ecology
300 Desmond Drive
Lacey, WA 98504-7600

Re: Department of Ecology 2013 State Environmental Policy Act (SEPA) Rulemaking

Dear Brenden,

Thank you for requesting comments on the discussion draft SEPA rule changes dated September 11, 2013 and discussed preliminarily at the September 17, 2013 meeting of the SEPA Rulemaking Advisory Committee created by SSB 6406 in 2012. Although I have served as state agency caucus representative on the Advisory Committee, the state agencies have opted to individually submit their respective comments on the discussion draft that are a precursor to proposed rules for public comment.

Thus, the following comments are submitted on behalf of the Washington Department of Natural Resources (DNR), where I serve as the Legal Affairs Liaison to the Commissioner of Public Lands and the Legal and Environmental Affairs Section Manager, among other duties. In this capacity, I manage a section that provides advice across our agency on compliance with SEPA and also assures conformance with meeting SEPA distribution and public comment requirements. Additionally, I have a background as an environmental, land use, and real estate attorney, having practiced law in these areas for almost twenty (20) years. Although the SEPA rules applicable to natural resource actions have been my recent focus as a SEPA practitioner at DNR, I have developed a long history of familiarity with SEPA and the SEPA process that involves a larger context.

DNR is an agency with varied responsibilities, including that of a large landowner (managing over 5.6 million acres of state owned land), a regulator (regulating forest practices and mining reclamation across the state), and providing resource protection (in the form of fire prevention, suppression, and forest health), among other responsibilities. As such, DNR both relies on SEPA to be informed of the environmental consequences of its action and relies on lead agencies across the state to inform DNR's decisions when DNR is not the lead agency but is an agency with jurisdiction or expertise or otherwise affected by a proposal. DNR appreciates Ecology's efforts to facilitate the SEPA Rulemaking Advisory Committee's input and obtain, analyze, prioritize, and respond to a variety of perspectives.

In submitting these comments, I have consulted with various DNR experts in varying program areas as well as coordinated and discussed changes with other state agencies who have expressed interest in this process. Please accept DNR's comments in the spirit of collaborative participation in the SEPA Rulemaking process that has taken place over the course of the last year or so. Generally, these comments are organized numerically by rule number to make them easier to track against the preliminary draft of proposed rule changes.

Importance of State Agency Role in SEPA

On behalf of state agencies, DNR is appreciative of the recognition of the need for a state agency advisory committee member in the SEPA Rulemaking process. Many state agencies regularly review proposals as lead agencies and changes to the SEPA rules affect state agencies equal to other participants in the process. State agencies participating in this rulemaking have uniformly supported the notion of updating the SEPA rules to be more efficient and relevant in the context of environmental laws that have been adopted since SEPA was enacted without losing the opportunity for the environmental analysis, and ultimately, when SEPA's substantive authority is used, the environmental protection that SEPA provides.

DNR, as a single state agency example, serves as lead agency for over 400 proposals in an average year, and as an agency with jurisdiction in over 4,000. Including the input of active SEPA practitioners in the process has helped improve the potential for the rulemaking to address real issues and real problems. There is always room for more improvement, and DNR encourages Ecology to create a regular updating cycle for the SEPA rules as there are a number of subjects that we did not have time to address with the legislatively driven deadline. For any revisions that occur prior to publication of the draft rules related to lead agencies, DNR requests Ecology consider the effect of the change on state agencies so that changes that promote local agency interests do not have unintended consequences for state agencies serving in similar capacities under SEPA.

Specific Proposed Rule Language Comments

WAC 197-11-508(1). DNR appreciates Ecology's willingness to update its website containing the SEPA register daily. A more significant improvement could occur if lead agencies had the ability to upload to the SEPA register directly.

WAC 197-11-510. DNR supports the notion of clarifying public notice requirements, however, the revision may not accomplish this. It inserts a subjective standard as to whether a sign is posted in a manner and location that ensures it can be seen by the public. It is also possible that a sign in remote rural and forested areas would rarely be seen by the public. The purpose of this rule is for the lead agency to use its discretion to determine the reasonable method to inform the public about an environmental document. This clarification is unnecessary and increases its vagueness.

WAC 197-11-755. The definition provided for land use decision may not be inclusive enough to cover all actions that would be traditionally considered land use decisions, which have been

defined under the Land Use Petition Act, RCW 36.70C.020(2). The term appears only to be used in WAC 197-11-800(6) and it should be noted that (6)(d) may not fit the new definition in (755). DNR recommends a definition is not added in (755) as proposed as it also suffers from being overbroad in that it could encompass land transactions (which are instead covered in other SEPA rules) and this would not appear to be the intent of having a defined term.

WAC 197-11-756. DNR supports Ecology's decision not to substantially alter the "lands covered by water" exception and has no objection to providing a GMA-based definition of wetlands that is also commonly used. It is worthy to note that the reason for the exception is that some of the most sensitive areas are on lands covered by water, reducing the likelihood that a proposal that impacts those lands should be presumed to be below the threshold of significance. DNR has a significant stake in this issue as an agency responsible for the management of approximately 2.6 million acres of state-owned aquatic lands that relies on the SEPA process to make certain impacts on aquatic resources are addressed.

Sometimes, SEPA provides the only opportunity for DNR to provide input to lead agencies regarding potential impacts to state-owned aquatic lands that may occur from projects proposed on nearby private lands or to perform its role as an agency with jurisdiction or expertise. It is thus important for the lands covered by water exception to several categorical exemptions to remain and include more than wetlands. If there is a need to appropriately limit this exception, DNR would not object to a statement that "lands covered by water does not include non-tidal drainage or irrigation ditches; artificially irrigated land that would revert to uplands without irrigation; artificial lakes, ponds, or small ornamental waters created by excavating dry land," as an alternative to the last sentence, which is the "wetland" exception to the exception that is proposed.

WAC 197-11-800(1)(b)(v). DNR supports this revision as providing additional clarity that there is an exemption both for fills and excavations that are not connected to a larger proposal and for those that are connected to specified minor new construction proposals. It is noted that the fill/excavation associated with a minor new construction proposal does not appear to have a volume limit in the language as drafted.

DNR also supports the deletion of the phrase that also provided an exemption for fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder because all Class I-III forest practices are statutorily exempt, especially given Ecology has opted not to adopt the statutory exemptions by rule.

DNR is concerned, however, about the revision in the same section adopted in December 2012 that changed a specific number of parking spaces to "stand-alone parking" without defining it. WAC *197-11-800(1)(b)(iv)* could be clearer if it instead stated, "This exemption includes parking lots not associated with a structure designed for twenty or fewer vehicles." This avoids the use of an undefined term and limits the size of the parking lot not associated with a structure to the same size as one associated with a structure, consistent with the nature of minor new construction exemptions.

WAC 197-11-800(2)(c)(vii). DNR has concerns about narrowing the scope of the culvert exemption to a limited purpose of road and street improvements because DNR, as a part of a larger effort being currently undertaken by the State of Washington in connection with litigation, (with specific near term timelines) must remove and replace culverts to provide for fish passage. DNR requests this exemption not be narrowed as proposed.

DNR supports Ecology's decision to retain the exemption in its current form of **WAC 197-11-800(3)(b)** so that it is clear shoreline protection under this exemption is of a very limited nature; expanding this exemption to bulkheads would likely exceed the environmental threshold of significance in a number of instances and eliminate DNR's ability to be aware of major proposals affecting state-owned aquatic lands.

WAC 197-11-800(5). DNR supports Ecology's proposal to provide a more precise definition of "authorized public use" to assist in interpreting the exemption related to real property transactions. DNR also acknowledges that different agencies use different definitions. For example, DNR's recreation rules regarding the use of DNR managed lands for recreation define "authorized" as written approval by DNR and "designated" as any facility, trail or location that has been approved by the department for public use. WAC 332-52-010. Although public lands are generally open to the public, there are exceptions and limitations under the Multi Use Act with respect to certain of the land DNR manages. RCW 79.10.100.

Washington State Parks uses a definition adopted in their own SEPA procedures interpreting "authorized public use" to mean that a particular piece of real property has been classified for public use, or has developed facilities subject to public use or has been specifically designated and classified for such public use. WAC 352-11-040.

Ecology's proposed language is tied to a public use being "designated" as such for recreational and general public use, which DNR agrees make sense from the perspective of the point of the exemption, i.e., to examine impacts when land is being transferred out of public ownership that is actively used by the public. However, not all recreational sites are "specifically" designated and the use of the term "preexisting," while appearing to relate to the public use existing at the time a proposal is submitted, could be mistakenly interpreted to mean preexisting at the time of the SEPA rule amendment. A slight modification of the proposed language would be consistent with the manner in which DNR and Parks apply this exemption and not create issues of interpretation as to what has to occur for a site to be "specifically" designated and "documented":

> The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to a <u>specific designated and</u> authorized public use <u>approved by the public landowner of the property related to the use of land by the public</u>.

Because this subsection is being proposed for editing at this time, DNR would like to point out a related interpretation issue that could improve public understanding of the exemption in WAC 197-11-800(5). DNR's interpretation of b) is that it applies to outright transfers of land, i.e., when a fee simple title is being conveyed because that is the circumstance that takes it out of

public ownership and would therefore potentially impact public use of the land. It would be helpful to clarify this language to add the phrase "out of public ownership." Hence, the subsection would read:

> The sale, transfer or exchange of any publicly owned real property out of public ownership, but only if the property is not subject to a specific designated and authorized public use established by a public landowner of the property related to the use of land by the public.

Finally, this section also specifically references only leases under c) rather than other lesser interests in property. DNR has interpreted (5)(c)(3) to include easements and other lesser interests in property to be consistent with the notion that when such interests in property are granted, but the use is not changing, there is no change to the environment that requires evaluation. It would not seem that a lease that provides exclusive use and possession of property should be treated differently than an easement that grants a right of use of property if neither of them involve a change in use and thus do not cause an impact on the environment. As Ecology has opted to change this exemption, DNR also would support revising **WAC 197-11-800(5)(c)** as follows:

> Leasing, granting an easement, or otherwise authorizing the use of real property when the use of property for the term of the agreement will remain essentially the same as the existing use, or when the use under the lease, easement, or other authorization is otherwise exempted by this chapter.

WAC 197-11-800(19). While DNR supports the notion of updating the procedural action exemption to acknowledge that SEPA regulations that implement, through development regulations, provisions that are consistent with comprehensive and shoreline master programs that have undergone SEPA review should be exempt. However, state agencies do not adopt comprehensive plans or shoreline master programs and so this limitation would eliminate the exemption for state agencies for their adopted SEPA procedures. Because all adopted SEPA procedures must comply with SEPA and the SEPA rules, including the exemption limits (and state agencies do not have the ability to increase exemption limits as do local governments), it is unclear what purpose is served for state lead agencies to be treated differently because they are not required to adopt comprehensive plans or shoreline master programs. DNR can rely on the first sentence of (19) to exempt SEPA procedures (i.e., because they, by definition, contain procedural not substantive standards), but the additional phrase creates ambiguity for state agencies. Hence, DNR requests that the word "Local" begin the second sentence of (19) so that it is clear this limitation applies to local government SEPA procedures.

Changes DNR Proposed that Ecology Failed to Include

WAC 197-11-800(17). During its earlier participation in the rulemaking process, DNR identified a need to clarify the basic data collection exemption but did not submit specific language. This is an area that needs updating due to the evolution of underwater uses since the SEPA rules were adopted and the potential for certain data collection uses to have adverse

impacts on navigation and public use and access, such as; tidal energy scientific buoys or other scientific structures. DNR requests Ecology consider the following revision:

> Basic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals shall be exempt, except data collection and research activities that involve placement of a structure below the ordinary high water mark of a water body that may interfere with navigation and public access or involve removal of resources attached or embedded to the aquatic lands. These may be strictly for information-gathering, or as part of a study leading to a proposal that has not yet been approved, adopted or funded; this exemption does not include any agency action that commits the agency to proceed with such a proposal.

WAC 197-11-800(24). During its earlier participation in the rulemaking process, DNR identified a need to clarify the existing exemption for recreational sites, a term that has never been defined and is open to interpretation. DNR's consistent interpretation of this exemption is that it applies to all manner of recreational sites that are not motorized, including; camp areas, trails, parking areas, and trail heads because each of these are recreational sites, i.e., locations were people recreate. SEPA is generally triggered when a recreation site involves more than 12 campsites (as provided in the exemption) and this could then also include trail connections to the campsites or otherwise as part of the larger proposal. Most often, DNR develops a recreational plan for a large landscape and conducts nonproject environmental review on the plan. Subsequently, when carrying out specific projects, some of them are exempt and some are not, depending on their scope.

DNR's proposal was to make certain the minor repair and maintenance exemption is consistent with the recreational site exemption in WAC 197-11-800(24)(g). DNR currently interprets **WAC 197-11-800(3)** to include trail repair, remodeling, and maintenance. Due to the additional revisions proposed by Ecology to WAC 197-11-800(3) expressly referencing "transportation facilities" it would improve the clarity of interpreting this exemption to also expressly address recreation site repair, remodeling, and maintenance as these are also "public facilities" falling under this exemption. Generally, replacing a trail or other recreational site is consistent with the existing exemption for recreational sites and adding clear language confirming this would improve the ability of lead agencies to interpret this rule. DNR suggests the following language be added to the proposed, revised WAC 197-11-800(3):

> The following activities shall be categorically exempt: The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities, or equipment. Public and private structures, facilities, and equipment is broadly defined to include utilities, transportation, recreational, and other structures, facilities, and equipment of similar scope and size to other exemptions in this section and that involve no material expansion in excess of other exemption thresholds for the type of structure, facility, or equipment; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks)....

This approach maintains the scope of the exemption to relate to other exemptions while confirming the exemption is available.

WAC 197-11-830. During its earlier participation in the rulemaking process, DNR identified a need for a rock sale exemption to be added to WAC 197-11-830 because the requested narrow exemption is consistent with other related exemptions. It is unlikely such sales would involve a significant impact and the environmental issues are addressed by other environmental laws, i.e., the forest practices regulations. Ecology did not include this provision in the proposed rule change due to the need for additional information. DNR encourages Ecology to reconsider adding such an exemption for occasional sales from forest pits less than 3 acres in size. Pits less than 3 acres in size do not require a reclamation permit. Forest practices rules regulate forest rock pits and forest use of the rock as a Class I, II, or III forest practice for DNR use and sales to nearby forest landowners for forest management uses. Adding this exemption to the existing exemptions would be consistent with the fill/excavation exemption as well as recognize forest practices regulations address the environmental impacts of this use. DNR would suggest one of two methods for adding this exemption:

> Option 1. Add a new provision to WAC 197-11-830 that reads: (9) Sales of rock from public lands involving rock pits less than 3 acres in size that are used for activities regulated under a forest practices application that is exempt under RCW 43.21C.037 and sales of rock from public lands for uses not associated with timber management that do not exceed the total volume threshold for excavation exempted under WAC 197-11-800(1)(v).
>
> Option 2. Revise WAC 197-11-830(7) to read: Those sales of timber or rock from public lands that the department of natural resources determines, by rule adopted pursuant to RCW 43.21C.120 do not have potential for a substantial impact on the environment.

Cultural, Historical, and Archeological Resources

Although we are awaiting input from the working group on addressing a number of issues on a complex and important set of topics in this category, DNR expresses general support for making certain that adequate steps are taken by SEPA Responsible Officials to have sufficient information to make a threshold determination with respect to these resources. Although much of the discussion has been focused on notice and the potential for needed changes to other statutes to strengthen the Department of Archeology & Historic Preservation (DAHP)'s authority, it should be noted that there is a mechanism within SEPA that could also bolster the information considered by the SEPA Responsible Official at the time of the threshold determination.

For example, in the section of the SEPA rules discussing the threshold determination, WAC 197-11-335 could be revised to add additional reinforcement of the need for the SEPA Responsible Official to have adequate information about the potential for the site of a proposal to include sensitive cultural, historical, or archeological resources that could be affected by proposed activities. For example, a simple addition could be added to gently prompt the responsible

official to search further if the Checklist response is "I don't know" or something similar. The following is a suggested revision for Ecology to consider and is consistent with the approach recommended by the SEPA Center at DNR for our responsible officials:

> New language in **WAC 197-11-100(2):** For cultural, historical, and archeological resources, the lead agency should consult with the Washington Department of Archeological and Historic Preservation (DAHP) to obtain data available from the state cultural resource database (i.e., WIZAARD) and/or another comparable resource database, including, but not limited to, data that would assist in determining if the area of project effect has a probability rating indicating a high or very high likelihood of such resources. Additionally, consulting with other entities, including Indian tribes, who may have specialized knowledge or information in the area of project effect.
>
> New sub-section to **WAC 197-11-355**: Require the proponent to conduct a survey of cultural, historical, or archeological resources depending on the information supplied in the checklist or available from the Washington Department of Archeological and Historic Preservation (DAHP) or consulted tribes.

While this revision does not require a lead agency to take a particular action, it reinforces the need to take steps to determine if enough information has been provided or is available to a lead agency before making a threshold determination.

Checklist Changes

DNR supports the revision of Checklist questions that relate to the impact on GMA resource lands, particularly in **B.8.b**. It is particularly helpful to address both agricultural and forest lands of long-term commercial significance, promoting an awareness of impacts on working farms and forests, as well as the question of such lands adjacent to proposals. As not all counties are GMA planning counties, it would also be helpful to include a reference to how many acres in forestland property tax status will be converted to a non-forest use. This could be added to B.8.b:

> If resource lands have not been designated, how many acres in farmland or forestland tax status will be converted to non-farm or non-forest use.

Also, although the committee is still awaiting the input from the cultural / archeological resources working group, DNR supports the revisions to **B.13**. on the Checklist.

During the rulemaking process, DNR received a request from the Invasive Species Council to add two questions to the Checklist:

> **B.4.d**. Add: List noxious weeds and invasive species known to be on or near the site.
>
> **B.5.c**. Add: List invasive animal species known to be on or near the site.

Additional Cleanup Changes for Ecology's Consideration

DNR notes that the following additional SEPA rule is now obsolete due to other changes in law and Ecology may wish to take this opportunity to correct it:

WAC 197-11-938(3)(c)(i) should be deleted because that criterion for forest practices Class IV FPA classification was eliminated in 2011 legislation (HB 1582).

Also, **WAC 197-11-835(2)** should be deleted because DFW no longer issues HPAs for forest practices per rule to become effective December 2013.

The following changes were previously suggested by DFW's representative[1] for the rulemaking:

> WAC 197-11-835(3) should revise the parenthetical reference to the department of game to the department of fish and wildlife.
>
> WAC 197-11-835(7)(1) should be revised from artificial game feeding to artificial wildlife feeding.
>
> WAC 197-11-835(12) should eliminate the term game.

Again, thank you for the opportunity to participate as a member of the 2012 and 2013 SEPA Rulemaking Advisory Committee and to submit comments on this preliminary discussion draft of the upcoming proposed changes to the SEPA Rules.

Sincerely,

Pamela Krueger
Legal Affairs Liaison
Office of the Commissioner of Public Lands

Cc: Fran Sant, Ecology
Carol Lee Roalkvam, WSDOT (co-state agency advisory committee member)
Allyson Brooks (DAHP)
Randy Kline (Parks)
Bob Zeigler (WDFW)

[1] This was recently provided to me in an email correspondence from Bob Zeigler dated September 16, 2013. No explanation was provided.